STATE OF MICHIGAN

COURT OF APPEALS

DONALD MILLER,

Plaintiff-Appellee,

v

AUTO ZONE, INC. and GARY HOUSE,

Defendants-Appellants.

UNPUBLISHED
May 15, 2007

No. 267651
Genesee Circuit Court
LC No. 04-078673-CL

Before: Neff, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

In this action brought pursuant to the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq.*, defendants appeal as of right from the trial court's judgment in favor of plaintiff on his retaliation claim and from the court's award to plaintiff of $100,000 in damages. We reverse and remand for entry of a judgment in favor of defendants.

I. Facts and Proceedings

Plaintiff began working at AutoZone in 1997 as the manger of a retail outlet in Flint. During the ensuing six to seven years, plaintiff had numerous conflicts with defendant Gary House, his district manager. At several points during these years, plaintiff submitted complaints of discrimination against House. In July 2003, plaintiff injured his back at work and was unable to resume work until October 2003. Plaintiff eventually returned to work, but was only able to work approximately five hours a day because of continued back problems. In July of 2004, because of his continued inability to work full time, plaintiff was placed on a full medical leave of absence.

On or about March 30, 2004, plaintiff filed a complaint against defendants. Count I is an all encompassing discrimination and retaliation claim based upon plaintiff's race. Although the paragraphs under count I contained citations to case law and statutory provisions, the only factual assertion specific to plaintiff's own case was that for his discrimination, retaliation and harassment claims under the Civil Rights Act, plaintiff was relying on an "undesirable job assignment and/or re-assignment" as constituting an adverse employment action. Count II, plead against both defendant supervisor and defendant corporation, likewise contains numerous paragraphs setting forth the terms of the Civil Rights Act as well as citation to case law supporting a claim of individual liability. As to specific facts relative to plaintiff's

circumstances, it asserted that plaintiff was discriminated against by the corporation because of his race, that he was paid less than similarly situated white employees and was denied promotions to which he was entitled. Additionally, plaintiff again asserted that he suffered adverse employment actions through "undesirable job assignment and/or re-assignment." On or about June 29, 2004, plaintiff filed a first amended complaint that contained the same counts I and II, but added a count III, asserting an assault claim against defendant House based upon a heated discussion that occurred between the two while at work.

At some point in 2004, plaintiff also filed a workers' compensation claim against defendant AutoZone. On January 25, 2005, while plaintiff was still employed by AutoZone, he settled the workers' compensation claim. As part of this agreement, plaintiff acknowledged that he was at that point "hereby voluntarily quit[ting] his employment with Auto Zone," as well as releasing any claim for wrongful discharge or violation of any state or federal anti-discrimination act that arose out of his employment or termination of employment with AutoZone. There was, however, a specific exception to the release, which stated in full as follows:

> It is expressly agreed and understood that, anything herein to the contrary not withstanding, this does not affect any claims or causes of action now pending in case number 04-78673-CL before Judge Neithercut, Genesee County Circuit Court.

A bench trial ensued. After listening to the evidence, the trial court concluded that plaintiff had failed to sustain his allegations of racial discrimination and assault, but had proven his allegation of retaliation. In ruling for plaintiff on the retaliation claim, the court held that plaintiff had been discharged, or constructively ("de facto") discharged, in retaliation to his internal complaints:

> However, the something rotten in Denmark deals with the *retaliatory discharge*.
>
> * * *
>
> Mr. House tells us that Mr. Miller is filing so many complaints – well, in plaintiff's exhibit number 4, Mr. House says that AutoZone is not supporting him regarding Miller's false accusations, and he says I feel Donald is harassing me. So, we have a district manager whose got his back up, he's on the defensive because of an irritating store manager, and things begin to deteriorate.
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> Mr. Miller files his lawsuit. After he files his lawsuit – and this is really significant. After his lawsuit and after all of the complaints, when he comes back to work from one of his medical leaves, he gets *reassigned back to Mr. House's home store. That's a punishment, that's a torture*. That's called take the two guys that despise each other and make the lower leveled employee work for the higher level one.
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> MR. CHRISTY: Your Honor, that was before the lawsuit, just for your information.

THE COURT: Okay, my timing is wrong. But *we've got all these complaints that were filed, and its been going on for a couple of years, and one of the responses is to put Mr. Miller in Mr. House's store. That's bad news.*

The plaintiff is still a pain in the neck because he continues to go out on these different medical leaves. And, as the company reasonably says, it's hard to figure how to predict when he's going to come back to work; but, you could see that that grew into frustration for the company. *And while they let him go on half time for quite a while, eventually they put him off on full medical leave, and the circumstances around that are just not by the book.* There's all these gaps that the Court sees in how those decisions were made.

* * *

And, frankly, Mr. Miller testified that going out on the full leave caused him all kinds of financial problems because he had to fight for his comp. *And I'm ignoring that fact that there was some sort of redemption down the road.* I think he testified he went seven months without receiving a dime from anybody, and that – *If you take that and you add to the fact that he was put in Mr. House's store after he began all of his complaints; if you throw into the recipe the fact that there were no negative employment evaluations; and you add to it the fact that nobody knows why they took his keys, except for Mr. Michalak, then you've got something rotten in Denmark.* This is a company that has an established policy of written evaluations, appraisals, disciplines, and sanctions; and yet, there are gaps in that.

* * *

There's something that I can't put a finger on, on how this all came about, but it's apparent to the Court that Mr. Miller became a very irritating employee and they needed to get rid of him and that they needed to get rid of him because of all of his complaints and all of his fulminations, *and so they retaliated by firing him, by de facto firing him, causing him to leave their employ.* [Emphasis supplied.]

Thus, according to the transcript, the trial court ruled that plaintiff proved that he engaged in protected activity (filing internal complaints alleging discrimination against House) and that defendants retaliated against plaintiff for making these complaints by (1) transferring him to the store where House's office was located, and (2) firing or "defacto firing" plaintiff.

The trial court then went on to award damages, concluding that plaintiff was entitled to past lost wages for the period from July 11, 2004 to November 29, 2005, in the amount of $62,350. As to non-economic damages, the trial court seemed to conclude that plaintiff had not proven any, but nevertheless awarded plaintiff $25,000:

I'm not impressed by Mr. Miller's claims for non-economic damages because it's almost as if there's a mitigation factor here. The reason they

> retaliated against Mr. Miller is because he was irritating and maybe paranoid; and if he's going to create this bad suit that everybody else jumped into, then I don't know that I can reward him with some huge non-economic damage award.
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> And the Court also wasn't impressed by Mr. Miller's testimony that he's been blackballed, that he can't get a job in that business because of this – I mean, he can say it happened to him, but if he had one employer come in and say, well, we're not giving anybody – we're not giving this guy a job because of AutoZone called us up and said don't hire him; if that had happened, then I could believe in future wage loss, *but I'm not convinced of what he has done to truly get himself employed as far as future wage loss goes.*
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> So, what the Court's going to do is give $12,650 in future wage loss and $25,000 in non-economic damages, and this will be a judgment for retaliatory discharge for $100,000 for the plaintiff. So be it.

After the trial court's ruling, the parties squabbled over the terms of the judgment. At the hearing for entry of the judgment, defendant argued that the trial court's judgment was based only upon a finding of retaliatory discharge. The trial court agreed that that was how the transcript read, but then clarified, or perhaps more accurately modified, it's ruling:

> And I appreciate that, Mr. Griffin [defense counsel], and I think you correctly interpret what that transcript says, but it just tells me that I misspoke myself when I gave my ruling because the reason that the Court talked about the reassignment was because that was a part of the Court's logic backing up *retaliatory harassment*.
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> The guy was a complainer and he complained that Mr. House was a racist, and so they reassigned him to Mr. House's store, which looks like a pretty retaliatory action. And that happened actually quite some time before he was fired, and apparently I misspoke myself. I think that the judgment that plaintiff proposes is the correct one. [Emphasis supplied.]

Defendants now appeal from that judgment.

II. Analysis

Because judgment was entered after a bench trial, we review the findings of fact to determine if they were clearly erroneous. MCR 2.613(C); *Carrier Creek Drainage Dist v Land One LLC*, 269 Mich App 324, 329; 712 NW2d 168 (2005). "Findings of fact are deemed clearly erroneous where the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 329-330. This standard also applies to our review of the damages award, and so long as we can find that the trial court was aware of the issues and correctly applied the law, no clear error will be found if the award was within the range of the evidence. *Triple E Produce Corp v Mastronardi Produce Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995). Legal questions are reviewed de novo. *Frericks v Highland Twp*, 228 Mich App 575, 583; 579 NW2d 441 (1998).

Defendants challenge the trial court's ruling on several fronts. We think the most logical arguments to address first are those asserting that the trial court's judgment in favor of plaintiff on the retaliation claim was either legally or factually insufficient. Within that subset, we first address the argument that the judgment should be set aside to the extent it was premised on plaintiff being discharged, an argument with which we are in accord.

The primary goal for a court interpreting any contract is to determine and then enforce the intent of the parties. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). Contracts must be considered as a whole, harmonizing all parts of the contract as much as possible. *Czapp v Cox*, 179 Mich App 216, 219; 445 NW2d 218 (1989). In *Cole v Ladbroke Racing Michigan Inc*, 241 Mich App 1, 13-14; 614 NW2d 169 (2000), we set forth the rules applicable to the interpretation of releases, which are of course contracts:

> The scope of a release is governed by the intent of the parties as it is expressed in the release. If the text in the release is unambiguous, the parties' intentions must be ascertained from the plain, ordinary meaning of the language of the release. A contract is ambiguous only if its language is reasonably susceptible to more than one interpretation. The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity.

In this case, the unambiguous language of the release precluded the trial court from awarding any damages associated with the termination of plaintiff's employment, i.e. any lost wages between January 25, 2005 and November 29, 2005.[1] Through the release, plaintiff specifically and unambiguously released any claims he may have had for "wrongful discharge" and "any and all claims arising out of [plaintiff's] employment or termination of employment with [AutoZone]." The only exception to this broad release were those "claims or causes of action" that were "now pending" in the instant case. At the time plaintiff signed the release his employment had not ended and, therefore, none of his three counts in his first amended complaint could (or did) have as a factual basis the termination of his employment. Thus, although plaintiff preserved his *claim* for retaliation, he released the possibility that a *factual predicate* for his retaliation claim would be his employment ending with AutoZone.[2] Consequently, plaintiff's receipt of the $90,000 settlement funds as consideration for signing the release barred any claim for damages associated with the termination of his employment with AutoZone. To the extent the trial court awarded damages to plaintiff relating to his employment ending with AutoZone, it must be vacated.

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[1] Because the trial court did not explain how it arrived at these specific awards, it is impossible for us to determine what amount of the future damage award, the economic and non-economic awards were related to plaintiff's employment ending with AutoZone. The trial court will have to make this finding on remand.

[2] As plaintiff correctly argues, constructive discharge is not a cause of action, but is a defense to an argument that the plaintiff left his employment voluntarily. *Vagts v Perry Drug Stores, Inc.*, 204 Mich App 481, 487; 516 NW2d 102 (1994).

The next question is whether the trial court erred in holding that plaintiff proved that his transfer to manager of another Flint AutoZone store was "retaliatory harassment." In every retaliation case, the issue is whether the defendant retaliated against an employee for engaging in protected activity. *Garg v. Macomb County Community Mental Health Services*, 472 Mich 263, 272; 696 NW2d 646 (2005). MCL 37.2701 provides:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

According to *Garg*, to establish a prima facie case of retaliation, a plaintiff must show:

> (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. [*Garg, supra* at 273, quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).]

In a "typical" retaliation case, a plaintiff must establish that the retaliation took the form of an adverse employment action – such as a termination, demotion, lay-off, etc. See *Garg, supra*; *Peña v Ingham County Rd Comm*, 255 Mich App 299, 311; 660 NW2d 351 (2003). Here, however, the trial court ruled that plaintiff's transfer to the Bristol Road AutoZone was "retaliatory harassment." And, in *Meyer v Center Line*, 242 Mich App 560, 570-571; 619 NW2d 182 (2000), we held that a supervisor's decision not to take action to stop "sufficiently severe" harassment can constitute an adverse employment action.[3]

As noted by the *Meyer* Court in its discussion of the federal cases that recognize a "retaliatory harassment" argument, the "harassment" must still be in the "severe" category. See *Meyers, supra* at 569-571. The trial court's supplemental finding of "retaliatory harassment," however, did not have as its foundation defendant's failure to take action on plaintiff's complaints. Instead, the trial court ruled that plaintiff's transfer to the Bristol Road store – an actual act – was what constituted the "retaliatory harassment." But in doing so the trial court did not explicitly hold that the transfer of plaintiff to the Bristol Road store was "sufficiently severe" harassment such that it constituted an adverse employment action. Nonetheless, that conclusion is at least implicit in the trial court's ruling. That decision was in error. Certainly, if the transfer were considered under the well-developed "adverse employment action" law, the transfer would not constitute an adverse employment action because there was no loss in pay, benefits,

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[3] In support of this holding, this Court relied upon, among other decisions, *Morris v Oldham Co Fiscal Court*, 201 F3d 789, 791 (CA 6, 2000). This seems to be in accord with *Burlington Northern and Santa Fe Ry Co v White*, ___ US ___, ___; 126 SCt 2405, 2415; 165 L Ed 2d 345 (2006).

responsibilities, title, or other assertion that the store location caused any diminution in plaintiff's job. See, e.g., *Peña, supra* at 311-312; *Kocsis v Multi-Care Mngmt, Inc*, 97 F3d 876, 885 (CA 6, 1996).

What this issue comes down to is whether AutoZone's decision to place plaintiff in the store where House had his office was "sufficiently severe" to allow the trial court to hold that it was an impermissible form of retaliation. We conclude that it was not, and therefore we must reverse. Focusing on this transfer, plaintiff admitted during trial that he returned to work on October 8, 2003, and was informed he was now the store manager at Bristol Road. Additionally, plaintiff admitted that while he was on his leave of absence, the store manager at Bristol Road was placed into the Clio Road store to keep it running under a store manager. Most importantly, plaintiff admitted that soon after he was assigned to Bristol Road, he complained to Dave Michalek, and thereafter House moved his office to another store in Imlay city. We cannot conclude that the mere transfer to the new store was "sufficiently severe" when the only complaint about the transfer – House's office location – was remedied once plaintiff complained. In light of these admitted facts, we conclude as a matter of law that the transfer was not sufficiently severe conduct such that it constitutes a prohibited, retaliatory act protected under the law.

Reversed and remanded for entry of a judgment in favor of defendants. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Christopher M. Murray